United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

77-7187

B pls

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UNITED STATES COURT OF APPEALS
FILED
APR 17 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DOCKET NOS. 77-7187; 77-7271; 77-7273

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of its membership affected and in behalf of Classes involved herein, GARY MICHAEL, MICHAEL FAGAN and MARTIN F. RANDOLPH, JR., individually and as Class Representatives, and in behalf of all other parties similarly situated and circumstanced,

Plaintiffs,

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN,

Plaintiffs-Appellants,

I. WALTON BADER,

Appellant,

-against-

TELEPROMPTER CORPORATION, TOUCHE ROSS & COMPANY, HERBERT SCHLAFLY, WILLIAM BRESNAN, MARVYN CARTON, "JOHN DOE" and "RICHARD ROE", the names "JOHN DOE" and "RICHARD ROE", being fictitious, the parties intended being those persons, firms, corporations and associations involved in the unlawful acts involved herein,

Defendants,

TOUCHE ROSS & CO.,

Defendant-Appellee.

HARRY LEWIS, et al.,

Plaintiffs,

against-

TELEPROMPTER CORP., et al.,

Defendants.

Consolidated Appeal

APPELLANTS' PETITION FOR REHEARING

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Consolidated Appeal

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

All appellants respectfully petition this Court under FRAP 40 for rehearing, in certain limited respects, its decision filed April 4, 1978, in this appeal and suggest under FRAP 35(b) that rehearing, if granted, be en banc. Their reasons for requesting such relief are set forth below.

Issues Presented for Rehearing

Appellants respectfully submit that, based upon its opinion, "the court has overlooked or misapprehended" each of the following issues within the meaning of FRAP 40 and that each issue satisfies the requirements FRAP 35 for rehearing en banc.

(1) In light of the court's express conclusion (n.5) that

> "it is apparent that the delay of a few days in ascertaining the dates of purchases, the number of shares purchased, and the price per share paid (i.e., the substance of the subject Touche Ross interrogatories) was of no moment in the instant action. . .,"

does it not follow a fortiori (a) that the following mandatory language of Rule 61, F.R. Civ. P., were applicable to the Rule 37 application by Touche Ross below:

> "the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial

rights of the parties"

and (b) that the application should have been dismissed as based upon "harmless error" by counsel for the plaintiffs?

(2) In light of the fact that counsel for Touche Ross did not file with its Rule 37 application for sanctions below an affidavit in compliance with Local Rule 9(f) of the Southern District, which provides that

> "no motion. . . (under Rule 37) shall be heard unless counsel files with the court at or prior to the argument an affidavit certifying that he has conferred with counsel for the opposing party in good faith to resolve by agreement the issues raised by the motion without the intervention of the court and has been unable to reach such an agreement,"

or comply in fact with the substance of that rule by conferring with appellants' counsel, was it not error for the district court to conduct Rule 37 proceedings and impose sanctions without dealing in any way with the mandatory language of Rule 9(f)?

(3) Was it not a violation of due process of law for the district court to impose attorneys' fees of Touche Ross in the amount of $7,500 (plus disbursements) as a Rule 37 sanction because (a) the amount of the award bore no rational or stated relationship to either the behavior punished or the services so required and rendered by counsel and was therefore arbitrary, (b) the amount of the award was inconsistent with the fact, found by this

Court, that the delay in serving interrogatory answers which Touche Ross sought to punish under Rule 37 "was of no moment in the. . . action," and (c) the district court refused to conduct upon demand by appellants an avidentiary hearing on the amount of the award of attorneys' fees, as required by this Court's holding in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)?

(4) Was it not a violation of appellants' right to a jury trial under the Seventh Amendment for the district court to impose a penalty of more than $8,000 under Rule 37, wihtout granting the demand for jury trial as to all issues in the action made in the complaint?

(5) Was it not a violation of the decisional law with respect to the applicability of State Substantive Law as to the sufficiency of a verification on interrogatory answers under the rationale of Erie v. Tompkins, 304 U.S. 64, and following cases since, under the substantive law of the State of New York governing verification, the copies served on adverse counsel, concededly in time, would be sufficiently verified under New York State Law.

Reasons for En Banc Rehearing

A. Application of Rule 61

As suggested in Issue (1) above, appellants submit that specific findings of fact made by the court in footnote 5

of its opinion establish for the purposes of this aciton that the delay of a few days in filing duly verified interrogatory answers (following service of unverified but substantially identical answers within the time required by district court order) upon which the district court based its Rule 37 sanction of over $8,000 below "was of no moment in the instant action." In short, if it was an error for plaintiffs' attorney to serve the verified answers late (but as soon as he could physically do so), that error was entirely harmless and prejudiced Touche Ross not at all.

We submit that the court inadvertently overlooked the application to those indisputable facts of the mandatory language of Rule 61, which provides that the district court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The language is mandatory: it allows no discretion. The behavior relied upon by Touche Ross in its application for Rule 37 sanctions clearly did not adversely affect any "substantial right" of Touche Ross, whether procedural or substantive, for there was simply no prejudice of any kind. The elaborate punitive proceedings conducted by Judge Owen were not only pointless and a self-evident waste of the valuable time of the district court and the attorneys

involved, they were in direct violation of a mandatory procedural rule requiring the district court to "disregard" inconsequential matters such as this.

B. Local General Rules 9(c) and 9(f)

These rules read in part as follows:

Rule 9(c)(1)

"* * *All motions and exceptions under Rule 26 through 37 inclusive of the Rules of Civil Procedure* * *

Rule 9(f)

"No motion of the type described in subparagraph (1) of subdivision (c) of this rule shall be heard unless counsel files with the court at or prior to the argument an affidavit certifying that he has conferred with counsel for the opposing party in good faith to resolve by agreement the issues raised by the motion without the intervention of the court and has been unable to reach such an agreement* * *"

The relevant text of these rules are quoted above. Like Rule 61, its application is mandatory upon the district court and not discretionary. Judges of the Southern District are flatly forbidden by local rule to conduct proceedings of the kind Judge Owen conducted here without efforts to resolve the issue in good faith between counsel and an affidavit from the moving party on file describing such efforts and the results thereof, if any. There were no such efforts here, and no such affidavit was ever filed. Consequently, it was error for the district court to conduct

these pointless and extensive prcceedings over an entirely inconsequential matter. In its deliberations, the court apparently overlooked Local Rule 9(f).

C. Violation of Due Process Rights

Issue (3) above summarizes the respects in which the Rule 37 proceedings and sanctions below violate appellants' due process rights. It appears that those particular constitutional aspects of this appeal were overlooked or misapprehended by the court in the deliberations which resulted in the filed opinion.

There is clearly no discernible or stated relationship of any kind between either (a) the action being punished (service and filing of verified interrogatory answers several days late, which was "of no moment" in the action) or (b) the services on the part of counsel for Touche Ross required by that action (which were zero, because the delay was entirely inconsequential and thus did not either require or reasonably justify a Rule 37 application by Mr. Eno). Consequently, the imposition of a penalty in the form of an order requiring the payment of over $8,000 as counsel fees and disbursements was arbitrary and contrary to due process of law.

Since the delay in serving the verified answers was "of no moment", the district court was not justified,

as a matter of due process, in awarding anything more than a token or minimal penalty.

After the district court concluded that Rule 37 had been violated and counsel fees would be awarded, but before such an award was made, appellants demanded an evidentiary hearing under due process and Grinnell on the determination of the amount of the fee award. The district court rejected that demand and awarded an $8,000 penalty without conducting a due process hearing on the issues raised by the affidavit of counsel's services submitted by counsel for Touche Ross. The constitutional violation would appear to be self-evident, but was somehow overlooked by the court.

D. Right to Jury Trial

In their complaint, the appellant plaintiffs demanded jury trial as to all issues in the action. That demand was never waived or limited. When the time came that Touche Ross demanded and Judge Owen conducted punitive Rule 37 proceedings, that prior plenary demand for jury trial was still in effect. It was therefore a violation of appellants' jury trial rights under the constitution for Rule 37 proceedings to be conducted by Judge Owen on a "bench trial" basis and not before a jury.

E. Sufficiency of Originally Served Answers

It is uncontroverted that, at the time that the Court ordered answers to interrogatories to be served, copies of such answers were, in fact, so served. These copies, however, did not bear the signature of the parties who were to answer them. However, the Substantive Law of the State of New York, CPLR 3020(d), permits verification of a Court document to be made by an attorney if the party involved is not within the county where the attorney has his office.

Also, under the substantive law of the State of New York, an attorney need not verify a document, his signature is sufficient (CPLR Rule 2106).

In addition, as to IIPL, FAGAN and RANDOLPH there are duly filed Powers of Attorney which gave Appellant's attorney the right to verify documents (New York General Obligations Law, Section 5-1502H).

Rule 33(a) FRCP merely requires that answers to interrogatories be made as follows:

> "* * * Each interrogatory shall be answered separately and fully under oath * * *. The answers are to be signed by the person making them * * *"

There is no specific requirement that interrogatory answers be made by a party and the requirement of "an oath" are determined by State Law. Thus, since the verification

of the answers served is the only infirmity with respect to the answers concededly served in time, and the sufficiency of verification is determined by State Law under Erie the Court apparently overlooked the point that the originally served answers were, in fact sufficient.

Also, with respect to the IIPL answers, even Federal Law would have held such answers signed by an attorney sufficient (see cases cited on page 30 of Appellants' main brief). Also, of course, GARY MICHAEL was not a plaintiff in the action at that time and had no obligation to sign interrogatory answers (see cases cited on page 21 of Appellants' main brief.)

CONCLUSION

For the reasons set forth above, the relief requested in this petition should be granted.

Dated: White Plains, New York
April 17, 1978

Respectfully submitted,

BADER & BADER

By _____
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BADER

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 17 day of April 1978 deponent served the within Petition upon

Rosenman, Colin, Esqs.

attorney(s) for
Appellee

in this action, at

575 Madison Ave., NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this 17 day of April , 1978

WILLIAM BAILEY
Notary Public, State of New York
No. 43-4661518
Qualified in Richmond County
Commission Expires March 30, 1979